PUBLIC PROSECUTOR

v.

HARILAL SACHI S/O NARAYAN

HIGH COURT SABAH & SARAWAK, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J
[CRIMINAL APPEAL NO. 41-20-95-II]
4 SEPTEMBER 1995

PRACTICE & PROCEDURE: *Trial within trial - Re-call of witness - Criminal Procedure Code, s. 425 - Application made after defence's submission - Whether the closure of the trial within trial had precluded any invocation of s. 425 of the Code - Whether mandatory for the Court to allow application.*

This was an appeal against the learned Magistrate's decision in acquitting and discharging the respondent, charged under s. 354 of the Penal Code. It was contended by the appellant that the Magistrate had erred when he refused the prosecutor's application to re-call its witness, TPW1, who recorded the statement made by the accused under s. 112 of the Criminal Procedure Code.

During trial in the lower Court, the admissibility of the statement made by the accused was questioned and as such, a trial within trial was held to determine the admissibility of the said statement. The prosecution called its only witness, TPW1, the police officer who recorded the statement. He gave evidence leading to the making of the statement, but the statement was neither identified nor tendered as exhibit during the trial within trial. The defence Counsel in his submission concluded that there was no statement as alleged, as TPW1 did not identify the statement and no statement was shown to him.

The prosecuting officer in his turn to submit applied to re-call TPW1 pursuant to s. 425 of the CPC. Defence Counsel argued that the application was made too late and if the application was allowed, it would lead to a further trial. The Magistrate as such rejected and dismissed the prosecuting officer's application on the ground that the trial within trial has already closed after the last witness was called and its closure had precluded any invocation of s. 425 of the CPC.

In the appeal proper, the learned DPP drew the Court's attention to the purpose behind s. 425 of the CPC and contended that it became mandatory upon the Court to allow the prosecution's application to re-call the witness if his evidence appears to the Court essential to the just decision of the case.

Held:

[1] Section 425 of the Criminal Procedure Code consists of two parts, the first giving a discretionary power to the Court under which it may (1) summon any person as a witness or (2) examine any witness in attendance, though not summoned as a witness or (3) to re-call or re-examine any person already examined. The second part of the section imposes an obligation on the Court to summon and examine or re-call or re-examine any such person if his evidence appears essential to the just decision of the case.

[2] The purpose of the trial within trial is to enable the learned Magistrate to decide at the close of the trial as to whether the said statement can be admitted as evidence in the main trial.

[3] By not allowing the application, the learned Magistrate will not be able to decide on the issue for which the trial within trial was held, i.e. the issue of whether the statement is voluntarily made or otherwise. His inability to decide, will leave at large the purpose for which the statement was intended by the prosecution to be put in as the evidence for the prosecution against the accused. Therefore the matter squarely falls within the second part of s. 425 of the CPC.

[Order of acquittal and discharge set aside; case to be remitted below; Magistrate to re-call witness; prosecution to be allowed to adduce additional evidence; Court to decide on admissibility of statement; if statement admitted, Magistrate to decide on merits of the case].

Cases referred to:
R. v. Day [1940] 1 AER 402 CA ***(refd)***
Ramli bin Kechik v. PP [1986] 2 MLJ 33 ***(refd)***

Legislation referred to:
Penal Code, s. 354
Criminal Procedure Code, ss. 112, 113, 425

For the appellant - Mohd Zubir bin Jantan, DPP
For the respondent - Charles Kanavathi; M/s. C.M. Kanavathi & Co.

JUDGMENT

Abdul Kadir bin Sulaiman J:

This is an appeal by the public prosecutor against the decision of the learned Magistrate acquitting and discharging the respondent who was the accused before the learned Magistrate, after hearing his defence. For purpose of record, this case against the accused on a charge of outraging the modesty under s. 354 of the Penal Code was earlier acquitted and discharged by him at the close of the prosecution case without calling the accused to enter upon his defence. The public prosecutor appealed against that decision and Denis Ong J who heard the appeal of the public prosecutor, allowed the appeal and ordered the defence of the accused be called. Hence the calling of the defence resulting in the accused again being acquitted and discharged after his defence is heard.

In this present appeal, altogether 10 grounds were put up by the public prosecutor. Of the 10 grounds of which some of them overlap one another, grounds 8 and 9 are of paramount importance for this Court to decide first before considering the other grounds of appeal. In essence, the appeal on these two grounds is that the learned Magistrate has erred in refusing the application of the prosecution to re-call TPW1 pursuant to s. 425 of the Criminal Procedure Code, (the CPC), in the course of the trial within trial to determine the admissibility of a statement made by the accused under s. 112 of the CPC with a view to impeach the credit of the accused under s. 113 of the same. At the end of the trial within trial, the learned Magistrate did not decide on the admissibility or otherwise of the alleged statement of the accused made under s. 112 of the CPC because the prosecution did not tender it as an exhibit. Instead, after rejecting the application of the prosecution for the re-calling of TPW1 with a view of tendering the statement, he proceeded on to hear the evidence of the accused in the main trial culminating in his decision acquitting and discharging the accused after considering his defence. In my view, the decision by this Court on the two grounds by the prosecution as mentioned above, is of paramount importance in deciding the fate of this case against the accused for if I were to find that the learned Magistrate has erred in disallowing the re-calling of TPW1 an order would be made for the learned Magistrate to do so and to proceed from there

to determine the case on the merits of the entire evidence in the case in the light of the fresh evidence to be adduced.

The issue of the accused statement under s. 112 of the CPC arose in fact during the examination in chief of the accused himself when he stated that his evidence in Court is the same as in his statement to the police. In cross-examination the accused said that on 12 September 1990 he gave a statement to DSP Abdul Razak between 8.30 and 9.40 p.m. He was then shown a statement by the prosecution to which the accused admitted to the statement and the signature therein to be his. Then the prosecution referred to the Court certain passages in the said statement. The Court ruled that the difference from his testimony in Court is glaring. Therefore, if the prosecution wished to use it to impeach the credit of the accused, the statement must be tendered. The learned Counsel for the accused then objected to the tendering on the usual ground that it was not voluntarily made. So the Court ordered a trial within trial to decide on its admissibility. See pages 68, 70 and 71 of the Appeal Record.

Following this, the trial within trial proceeded before the learned Magistrate. However, before the calling of any witness for this mini trial the Court marked the statement as ID1 for purpose of identification. The witness for this mini trial from the Appeal Record consisted of only one witness, i.e. TPW1, Supt. A. Razak Hassan, for the prosecution. The defence had no witness. TPW1 gave evidence leading to the recording of a statement by him from the accused under s. 112 of the CPC. He did not identify the so called statement neither was the statement tendered as an exhibit and TPW1 was then released. The learned defence Counsel then informed the Court that the defence has no witness and proceeded on to make his submission on the admissibility of ID1. He submitted that there is a document ID1 but it is not the statement recorded by TPW1 as he did not identify the statement, and no statement was shown to him. Thus he concluded that there was no statement as alleged. When it came to his turn to submit, the prosecuting officer applied to Court to re-call TPW1 under s. 425 of the CPC. His reason being that the further testimony of TPW1 is essential to the just determination of the case. In reply, the learned defence Counsel argued that only at the end of the submission, which I take it to be his submission, that the prosecution required to re-call TPW1. This is too late, said the learned Counsel. The application to re-call was made after hearing his submission when the document was available in Court all the time. Allowing the re-call would mean a further trial. In his ruling on the matter to be found at pages 76 and 77 of the Appeal Record, the learned Magistrate said that TPW1 was not shown ID1 and therefore, he has no idea what document the witness was talking about. He further ruled that the learned Counsel jumped on this fact at the close of the trial within trial and the prosecuting officer realising his error applied to Court to exercise its powers under s. 425 of the CPC to re-call TPW1. Agreeing that it was pure technicality, he ruled that s. 425 of the CPC has two limbs, which I agree, the first being discretionary and the second being mandatory if the witness's evidence appears essential to the just decision of the case. However, the impression that the Court is giving the prosecution a second bite of the cherry must be avoided, the learned Magistrate further ruled. He realised that the re-calling of TPW1 would only be to identify the document. However, upon his reading of s. 425 of the CPC, he concluded that the trial has already closed after the last witness was called. The application by the prosecution was made after defence had closed their case and submitted. Thus the closure of the trial within trial had precluded any invocation of s. 425 of the CPC. In the circumstances the application for re-call was rejected and dismissed. He then proceeded on with the cross-examination of the accused in the main trial. So the main trial proceeded on and at the end of it came his decision that the accused is discharged

and acquitted on the charge of outraging modesty on the ground that the accused succeeded in casting the requisite doubt.

In arguing the appeal on this issue of the re-calling of TPW1 the learned DPP drew the attention of the Court to the purpose behind s. 425 of the CPC and it becomes mandatory upon the Court to allow the application of the prosecution for the re-call of the witness if his evidence appears to the Court essential to the just decision of the case which he submitted to be so essential in this case so as to achieve the purpose for which the trial within trial was held i.e. to decide on the admissibility or otherwise of the statement made by the accused to the police. All necessary evidence required to prove the statement under s. 112 of the CPC that it was made voluntarily was adduced by the prosecution. The only thing left for the prosecution was to ask TPW1 to identify the statement and later to produce it as a prosecution exhibit. After that it is for the Court to decide whether the statement ought to be admitted or otherwise. For the defence, the objection to the re-calling of this witness is that though he gave evidence in Court he failed to identify the statement or any part of it. He was not even shown the statement despite the fact that the statement was available in Court and the main purpose was for the production of that statement and nothing else but the prosecution closed its case without doing so. The learned Counsel for the defence posed a question whether after the closing of the prosecution case and the defence case in a trial, the Court can still invoke s. 425 of the CPC. He cited *R. v. Day* [1940] 1 AER 402 CA in support of his contention that the learned Magistrate was right in refusing the application of the prosecution for the re-call of TPW1. In that case, the appellant faced a charge of forging a cheque and was convicted on the charge after his defence was called. His evidence in the defence was a complete denial of the forgery. The case was then adjourned, and at the resumed hearing, the Judge, on the application of Counsel for the prosecution, admitted evidence of a handwriting expert to say that there were similarities between the known genuine handwriting of the appellant and the handwriting of the signature on the cheque. It was contended by the appellant that this evidence was wrongly admitted. On appeal to the Court of Appeal it was held that the evidence was wrongly admitted as it was not evidence upon any matter which arose *ex improviso* or evidence the necessity for which no human ingenuity could have foreseen, but was evidence the necessity for which was obvious from the commencement of the proceedings. I do not think that I can agree because the decision in that case is not based on a similar provision, as contained in our s. 425 of the CPC. Section 425 states:

> Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or re-call and re-examine any person already examined, and the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it essential to the just decision of the case.

As stated by the then Supreme Court in *Ramli bin Kechik v. PP* [1986] 2 MLJ 33 this section consists of two parts. Mohamed Azmi SCJ (as he then was) (delivering the judgment of the Court) at page 34 has this to say in relation to s. 425 of the CPC:

> For this purpose, s. 540 Indian Criminal Procedure Code 1898 is *in pari materia* with our s. 425. From the commentaries on the Code of Criminal Procedure 1898 by *Chitaley, & Rao,* Vol. IV (5th Edition) the scope of this section is to enable and in certain circumstances to impose on the Court the duty of summoning witnesses who would not otherwise be brought before the Court. The section consists of two parts, the first giving a discretionary power to the Court under which it may (1) summon any person as a witness or (2) examine any witness in attendance, though not summoned as a witness or (3) to re-call or re-examine

any person already examined. The second part of the section imposes an obligation on the Court to summon and examine or re-call and re-examine any such person if his evidence appears essential to the just decision of the case. The section is intended to enable the Court to get to the truth and to come to a proper conclusion in the matter under inquiry or trial. It is not limited to witnesses whom the Court examines on its own behalf but also applies to witnesses for the prosecution as well as witnesses for the defence. Hence, the defence as well as the prosecution may be allowed to adduce additional evidence under this section. The object of the section is just as much the prevention of escape of a guilty person through some carelessness of the prosecution or the Magistrate as the vindication of the innocence of the person wrongly accused owing to the carelessness and ignorance of one party. If there is the apprehension of justice failing by any erroneous acquittal or by any erroneous conviction the Court would be justified in exercising discretion in calling for additional evidence under this section. Where the Court is of the opinion that the evidence of certain witnesses is essential to the just decision of the case, it is bound to summon them, and for this purpose the trial can be adjourned. A just decision under this section does not mean a decision in favour of the defence (see *Rengaswamy Naicker's* case). Thus, it would not be an improper exercise of the power merely because the evidence taken supports the case of the prosecution and not that of the accused. In our view, by its very nature the discretion to be exercised under s. 425 of the CPC depends on the facts of each case - the main consideration being the essentiality of the additional evidence to a just decision of the case.

In the present case, in the course of the giving of the evidence for the defence by the accused, there was a trial within trial ordered. The purpose is for the Court to decide on the admissibility or otherwise of a certain statement made by the accused before the trial to the police. It necessitated this trial within trial on account of the challenge by the defence that the said statement was involuntarily made. Earlier on, the Court had viewed certain passages from the statement as shown by the prosecuting officer. The Court noted that the difference between that contained in the passages shown and the evidence of the accused before him is glaring and had informed that if the statement is to be used to impeach the credit of the accused, it must be tendered. See page 71 of the Appeal Record. At this point, the defence objected on the ground that it was not voluntarily made. Hence, the Court ordered the trial within trial to formally decide on its admissibility. This is the proper thing to do. During these proceedings for the trial within trial, before the evidence is led, the Court marked the statement as ID1 for purpose of identification. The pertinent question to ask here is what is the purpose of this trial within trial? The answer is to enable the learned Magistrate to decide at the close of the trial within trial as to whether the said statement can be admitted as evidence in the main trial. It will be so admitted if the learned Magistrate were to find based on the evidence at this trial within trial that the statement was voluntarily made within the context of s. 113 of the CPC. On the other hand it he finds that the making of the statement appears to him to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in his opinion to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him, the statement becomes inadmissible and consequently it cannot be used in the cross-examination of the accused and for the purpose of impeaching his credit. See s. 113(1) proviso (a)(i) of the CPC. In short, at the end of the trial within trial, the learned Magistrate has to make a decision one way or another on the issue of this statement. However, through the carelessness of the prosecuting officer, I should say, this statement the purpose of which the trial within trial was conducted, was not shown to the sole witness for the prosecution, who happens to be the officer who said he recorded

a a statement from the accused, and also that the statement was never tendered in Court as an exhibit at the close of the case for the prosecution in this trial within trial. Only after the close of the defence case, and after hearing the submission on this issue by the learned defence Counsel that the prosecuting officer realises his carelessness and in his reply, had applied to Court to re-call TPW1 pursuant to s. 425 of the CPC. The learned Magistrate refused the application saying at page 76 of the Appeal Record that "the b impression that the Court is giving the prosecution a second bite of the cherry must be avoided" With all respect, I do not think that by allowing the application for the re-call, the Court is giving the prosecution a second bite.

On the other hand by not allowing the application, the learned Magistrate will not be able to decide on the issue for which the trial within trial was held, i.e. the issue of whether the statement is voluntarily made or otherwise as the statement was never c identified by the witness and exhibited as an exhibit. His inability to so decide, will leave at large the purpose for which the statement was intended by the prosecution to be put in as the evidence for the prosecution against the accused. Therefore, the matter squarely falls within the second part of s. 425 of the CPC as explained by the Supreme Court in *Ramli bin Kechik v. PP supra* in that the re-calling and re-examination of TPW1 would appear to result in the evidence to be adduced being essential to the just decision of the d case. The fact that the prosecuting officer was careless in not bringing out that aspect of the evidence at the appropriate time is immaterial for it is the essentiality to the just decision of the case that matters. In the circumstances, the learned Magistrate has erred in refusing the application of the prosecution for the re-call of TPW1 for the purpose. Another reason given by the learned Magistrate for disallowing the said application of the prosecution is that the trial had closed. See page 87 of the Appeal Record. I think e the reason for saying so is because of the wordings of s. 425 itself which by its provisions applies only at any stage of any inquiry, trial or other proceedings under the CPC. Therefore, if the trial had closed it is no longer at any stage of the trial. I think he has fallen into error here. Unless and until a decision or judgment is pronounced, the trial has not closed or completed. It is true that the prosecution case had closed but that is not the same as saying that the trial had closed. Therefore, it is wrong for the learned f Magistrate to conclude in his ruling that "s. 425 does not apply, the relevant trial for which re-call is needed is over."

Since the learned Magistrate has erred in rejecting the application of the prosecution for the re-call of TPW1, thereby disabling him from deciding as to whether the statement of the accused is admissible in evidence or otherwise resulting in leaving the issue of g impeachment at large, it is erroneous to consider the evidence of the accused in the light of the prosecution case to decide on the fate of the accused on the charge. In the circumstances, I set aside the order of acquittal and discharge of the accused, and remit the case to the Court below with a direction to the learned Magistrate to re-call TPW1 and the prosecution be allowed to adduce additional evidence with a view to the tendering of the statement of the accused as an exhibit and for the Court to decide on the h admissibility or otherwise of the said exhibit and if the statement is admitted, it may be used by the prosecution in the cross-examination of the accused and for the purpose of impeaching his credit pursuant to s. 113 of the CPC. The learned Magistrate is then to decide on the merits of the case on the whole in relation to the charge against the accused in the main trial and come to a proper decision. I so order.

i